IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Jualynn Kirkel & Kevin Ameriks,	)	11 B 47270
	)	Chicago, Illinois
	)	10:00 a.m.
Debtor.	)	April 02, 2013

TRANSCRIPT OF PROCEEDINGS BEFORE THE
HONORABLE TIMOTHY A. BARNES

APPEARANCES:

For Debtors: Mr. John Cloutier;

For Bridgeview Bank Group: Mr. Adam Rome;

Court Reporter: Jackleen DeFini, CSR, RPR
U.S. Courthouse
219 South Dearborn
Room 661
Chicago, Il. 60604.

THE CLERK: Jualynn Kirkel and Kevin Ameriks.

MR. CLOUTIER: Good morning, Your Honor. John Cloutier on behalf of the debtor.

MR. ROME: Adam Rome on behalf of defendants.

MR. CLOUTIER: We're here on my notion to reopen the case so that I can present a motion to alter or amend the February 6th order which allowed in part and denied in part my motion for sanctions.

THE COURT: I took a look at this and I took a look at the response. There's a couple of issues that I have, and one of them was pointed out in the response, which was you allege that there are issues with the previous order, but you don't say what they were. So, a general allegation of issues is not sufficient cause. Tell me what it is specifically that you are alleging was incorrect in the previous order.

MR. CLOUTIER: Well, I also filed the motion, it's in there, but I believe there's several errors in the decision. Post-discharge reaffirmation agreements are not allowed at all. There's a lot of case law on that. So any actions to collect is a violation, any of the communications to try and

collect a discharged debt, even if it's via a reaffirmation agreement after the discharge is not allowed.

The bank, in their affidavit, have stated that they had tried to work out a reaffirmation agreement and then the attorney for the debtor was not returning their phone calls; that they talked to him up to the day the discharge was entered, and then were not able to work out an agreement. He wouldn't return their calls after that, so they contacted the debtor directly. They bypassed the attorney.

And then that's how I got brought into the case, they scared her. She contacted me. I believe that's all part of the violation.

I would like to present my motion to reconsider the ruling of February 6th.

THE COURT: I don't see an error by the court. I see what you're saying, that you don't agree with what the court ruled. That's what you're saying. That's not an error and does not give you cause to seek reconsideration.

MR. CLOUTIER: I think the error is that the court ruled that the communication was not a -- after the discharge, was not a violation. And I

believe under the case law, any communication to -- in an attempt to collect a discharged debt is a violation. So I believe there was an error by the court.

THE COURT: I'm sorry, but didn't the court find there was in fact a violation under the order?

MR. CLOUTIER: It found a violation in their foreclosure filing of having a clause in there that may have allowed them to seek a deficiency judgment against the debtor. It did not find there was any violation in their communications to try and collect the discharged debt on the condominium.

THE COURT: So, counsel, what do you do with the allegation of the creditor that this is just simply a delaying tactic?

MR. CLOUTIER: What do I do with that?

THE COURT: Yes.

MR. CLOUTIER: Well, I think that -- I mean, here we have a person who is making their payments. And I think if they weren't going through this route of theirs to try and get the discharged loan paid, that they would not be going through this course of action. And so I think the violation was leading up to -- is causing -- their motivation in

doing the violation is causing them to take other steps to try and make their threat more credible. I think it's all just one big --

THE COURT: Is the bank right now able to execute upon its security interest while this is taking place?

MR. ROME: Yes, the bankruptcy hasn't been reopened, Judge. There's no adversary. We've been through all this. The reaffirmation that his client -- I mean, there was -- his client said she wanted to -- not rejected that, but wanted to reaffirm the debt. The box was checked. We went through a whole hearing on this. There's no new law; there's no new facts. Counsel sent me an email and told me they're not going to allow us to foreclose on this property one way or another. We're allowed to foreclose. We're not doing this to do anything else. We're not trying to collect on a debt. We are foreclosing against the property.

THE COURT: I agree with that, counsel. What I'm trying to find out is is this a tactic to stop you from the foreclosure.

MR. ROME: Absolutely, Judge.

THE COURT: And the question is how is it stopping you from --

MR. ROME: Well, if the bankruptcy is open, then we have to come back in front of Your Honor to lift stay or -- or -- I guess have the stay modified.

THE COURT: All right. Let me ask the debtor's counsel.

Why is it that this motion is presented so late? You filed the motion and you scheduled it five weeks out. That appears to support what counsel is saying, that this is a delaying tactic.

MR. CLOUTIER: Well, as I explained before, I don't do a lot -- practically no bankruptcy stuff, so I am not in a hurry to do things too quickly because it does tend to make mistakes.

THE COURT: Right, but do you understand it's not the filing of the motion, it's the scheduling of the motion. What you have done is you filed the motion, you scheduled a hearing five weeks after you filed the motion. That on its face appears to be a delaying tactic.

MR. CLOUTIER: Well, I mean -- I mean, if the motion is granted, the case is reopened. I mean, I'm expecting them to want to make a response to my motion. And I believe there will be time --

MR. ROME: We already filed our objection as soon as we got it, and there's nothing here to respond to. There's no new law; there's no new facts. He just says he wants the bankruptcy opened. Sent me an email telling me under no circumstances, I'm paraphrasing, will he allow the foreclosure to go forward. I don't know what grounds he has not to allow the foreclosure to go forward.

There's no grounds to reopen her bankruptcy. This issue has been handled and Your Honor heard briefs and heard oral argument and ruled.

MR. CLOUTIER: But I think the whole purpose behind their -- from the time they first contacted her and brought her in was to try and get the discharged debt repaid, and this is just them backing up their threat.

THE COURT: All right. So here's where we are, I'm not hearing this again on the merits. The issue is very clear to me that this is in fact -- I have heard nothing compelling here that this is anything other than a delaying tactic.

The local rules of bankruptcy procedure require that every motion must be presented within 30 days. That's local bankruptcy rule 9013(E). This motion was presented more than 30 days

after the filing of the motion. Local bankruptcy Rule 9013-(1)(G) states that the court in its discretion may deny any motion that does not comply with local Bankruptcy Rule 9013-(1)(E).

The motion is denied for failure to comply with the local rules.

MR. ROME: Judge, he filed a while back a motion for May 7th and for May 9th. May we have those stricken as well?

THE COURT: They're all stricken.

(Which were all the proceedings had in the above-entitled cause, April 02, 2013, 10:00 a.m.)

I, JACKLEEN DE FINI, CSR, RPR, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT OF PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUALYNN KIRKEL,	)	No. 11 B 47270
	)	Chicago, Illinois
	)	1:30 p.m.
Debtor.	)	February 6, 2013

TRANSCRIPT OF PROCEEDINGS BEFORE THE
HONORABLE TIMOTHY A. BARNES

APPEARANCES:

For The Debtor:	Mr. John Cloutier;
For Bridgeview Bank Group, Kevin Ameriks, and Josh Grossman:	Mr. Adam Rome;
Court Reporter:	Nicole Abbate, CSR U.S. Courthouse 219 South Dearborn Room 661 Chicago, IL 60604.

THE CLERK: Taking up the court's 1:30 matter, Jualynn Kirkel and Kevin Ameriks.

MR. CLOUTIER: Good afternoon, Your Honor. John Cloutier on behalf of the debtor, Jualynn Kirkel.

MR. ROME: Good afternoon, Your Honor. Adam Rome on behalf of the defendants.

THE COURT: Bridgeview Bank Group?

MR. ROME: Bridgeview Bank Group. There's Kevin Ameriks and Josh Grossman.

THE COURT: Okay.

MR. CLOUTIER: We're here on my motion for sanctions for the 362 violation and the 524 violation.

THE COURT: All right. So help me out procedurally. Which is I know that I -- I enter orders with respect to these matters and have parties submit various things. And I'm not certain that the parties had made today an evidentiary hearing, or whether they made today a day for argument or if they're waiting for the court to set it for another date. So I wanted to know where we are. Because I'm prepared to do any and all. I've been through all the documents. I've read everything. I've looked at the evidence.

MR. ROME: Your Honor, you had suggested that if there was a need for an evidentiary hearing after looking at the affidavits, you would require one. However, you set this day for argument and then indicated there might be a chance, after you went through the documents, that you would ask for an evidentiary hearing.

THE COURT: All right. Well, I'll tell you right now that unless anything in the argument changes my mind, I don't see a need for further evidence. I've reviewed the evidence submitted by both parties. And I am - I find that it is sufficient for the court to rule on the issue. As to arguments, however, I am prepared to hear argument from the parties. And in that set of circumstances, I would hear first from the movant.

MR. CLOUTIER: Thank you. Well, first of all what happened in this case was on November 22nd, 2011, the debtor, Jualynn Kirkel, filed a Chapter 7 bankruptcy proceeding. At the time, she had two loans with Bridgeview Bank. One was a second mortgage on a condo that she lived in and the other one was a second mortgage on a commercial building that she also owned.

There were negotiations between the

attorneys, Ms. Kirkel's attorney and the bank's attorney, about a reaffirmation, but no agreement was ever reached. During the course of the bankruptcy proceedings, the bank -- I don't know if they began or continued to take payments for the condo out of the -- out of her bank account.

Later on, after the discharge, they were still taking the payments out. She told them to stop. They refused, and she had to close her account to keep them from continuing to take the money out. In February of 2012, before the discharge was received, Nerma Bajramovic, one of the vice presidents of the bank, called Ms. Kirkel in to come talk about the bankruptcy in progress. This was while the bankruptcy was in progress. It was not a discharge yet. It should have been -- if there were discussions to be had, it should have been with her attorney and not with her directly. So that's a 362 violation.

Ms. Kirkel went to the meeting. She explained to them that she was going to let the condo go, but was going to keep payments on the -- going on the commercial property, which she had continued to make. At the meeting, she was told that either she was going to have to reaffirm the debt on the condo,

or at least part of it. They said they wanted $50,000 or they would foreclose. She thought it was an empty threat because she'd had the loan for a long time and had always made her payments, never late on it. So she didn't think it was a real threat. Plus, they were receiving a good interest rate, over seven percent. And the meeting ended with them saying she had to pay something on the condo loan. On March 7th, 2012, she did receive a discharge. There was no reaffirmation on either loan.

Shortly after that, she ran into the president of the bank, Suellen Long, at the nail salon, and was told that she needed to come in to discuss the Sheridan condo loan. I guess Ms. Long told her she was going on vacation so make an appointment after she came back. I guess they met on March 27th, 2012, along with the VP, Nerma Bajramovic, and she was again told that she had to pay something on the now discharged condo loan. And that's a 524 violation. They said if there was no payment, no reaffirmation on the condo loan, they would foreclose, even though the loan was current. And at this point then she started to believe they were really serious. They gave her the bank's lawyer's phone number, Josh Grossman. In Ms. Long's

affidavit, she said that Ms. Kirkel gave them my information. I don't know how it was possible because she didn't learn of my existence until after the meeting when she called one of my clients who then referred me to her -- or her to me. And we've got the phone records to back that up, although that was not part of the evidentiary statement. She called me that day. I listened. I told her I didn't know much about bankruptcy. You know, I handle foreclosure matters, and that was about it. About a 12-minute conversation.

Again, on April 2nd of 2012 at 3:32 she called me, so I was in the area, so I met with her. She showed me the discharge and told me the threats to foreclose and that the bank was saying that she needed to get a lawyer and contact their lawyer. So at 4:39 that day, I called Josh Grossman, who confirmed what she said, that the bank was demanding 55 percent reaffirmation of the condo loan or they were going to foreclose on the commercial loan. I told him my understanding of bankruptcy was that they couldn't link the two. And he said that he had case law. Not being a bankruptcy attorney I, you know, gave him the benefit of the doubt that he had the case law, but it was a short conversation. He

had to go so he called me the next day. He called me the next day at 3:07 and again told me the 55 percent reaffirmation, but that they were open to offers. He said the case -- he told me that the case law allowed them to link the two together and that he would send me the case law. And on that assumption, that he was telling me what was true, I then talked about, well, maybe we can, you know, make everybody happy and put some deal together. The people who referred her to me are experienced foreclosure buyers. Maybe the bank has something they want to get rid of and we can do something to make everybody happy. But it was not me that approached them about the trying to negotiate a deal. My calling them was in response to their demand to either -- to her to reaffirm or they would foreclose. After that, I started researching the issue about whether they can do this kind of thing.

It looks like on the 12th of April, I responded to a message left. I told them I needed another week to review the law. On the 13th of April, Mr. Grossman, the bank's attorney, in-house counsel I guess, said that -- he sent an e-mail, which is part of the evidentiary statement. He said that he wouldn't file a foreclosure complaint but could not guarantee that he could give me a full

week. He said to talk to Kirkel, see if a settlement could be reached. And it was clear, you know, reaffirmation or foreclosure. He said he was still looking for the case law at that time.

I wanted some kind of record of the discussions, so I sent him an e-mail, which basically was a memorandum of our discussions. I pointed out that he was telling me that if Ms. Kirkel did not agree to reaffirm the condo loan or a percentage of it that they would foreclose, that the bank wanted 55 percent, which I calculated to be about $50,600. I said that as I said in the first conversation, I have little bankruptcy experience. Their demand to reaffirm or they would foreclose on the other property did not seem to fit the bankruptcy law. I talked about the standard should be commercially reasonable and that it was improper, in my opinion, to link the two. And since she was just coming out of bankruptcy, where would she get the 50,000. I said, well, maybe ten percent would be appropriate for in order not to receive further threats, along with a possible refinance to amortize the loan. Four and a half percent over 20 years is what I mentioned. I also pointed out that Ms. Kirkel was very upset because of the demands, was having trouble sleeping

and was basically in a panic. I never got any response saying there was anything incorrect from my statements.

On April 19th, 2012, Mr. Grossman sent his case law to me that he said backed up his position and that they could link the two. Their case law was Jamo, which talks about during a bankruptcy proceeding, during the discharge, the two may be linked. But other -- it doesn't say anything about after. It also talks about that they can't be -- it can't be coercive negotiations. And Jamo only applies until the discharge is received. After the discharge is received, they can no longer be linked like that. He also sent me In re Schmidt, which again was a similar case, but was -- it was a case during bankruptcy and not post-discharge.

In his e-mails, his e-mails, especially that one, clearly show his stance that they were demanding reaffirmation or foreclosure and he -- his argument was that they were totally justified in doing that even post-bankruptcy. And it shows that I wasn't the one that approached him about this, that it was coming from them.

On April 26th, I sent him an e-mail saying I disagreed with his case law and I disagreed

with the fact that the loan would be due because under later case law, there's ipso facto clauses and loans are no longer enforceable. Just a bankruptcy itself doesn't make -- they can't just call in a loan due from the bankruptcy. And on the 28th of April, I get an e-mail pointing out the bank's threat to reaffirm or foreclose. Mr. Grossman responded that -- to quote:

[AS READ:

My client has no more patience in this matter. You have till Wednesday, 5:00 p.m. to make your -- to make my client an offer. If you do not make an offer by that time, then I will have to assume that no offer is coming and I will file my foreclosure on Thursday morning.]

At 4:51 on the afternoon of the deadline, he sent me an e-mail which asked if I would accept service on behalf of my client. At -- before I received that, I had submitted my offer to the bank in response to their demand. And I said that the bank is in violation by making the threats, and that we would be willing to, you know, refinance at five and a half percent for 25 years but we would not engage in any kind of reaffirmation.

Looking at the case law, I could see

that even at that point, a post-discharge, a reaffirmation agreement would not have been enforceable. And I probably could have agreed to do something, agreed to refinance alone. And then pointed out that the reaffirmation wasn't agreeable but I kept it right out and said, you know, it's not permitible [sic] -- permissible to do what he was asking and so we couldn't do the reaffirmation.

And then a couple of weeks later, I received an e-mail saying the bank had decided to foreclose and again asked me if I would accept service on behalf of my client. And then over two months went by. I thought -- I concluded that it had been just bluffing on their part, and -- but on July 20 of 2012, Mr. Ameriks of the bank, another one of the bank's attorney, did file a foreclosure action. And also in the demand in the foreclosure was a demand for a deficiency judgment.

Also, I did miss one point. Oh, when I did say that I thought that -- I told them on April 28th that I had told my client that I thought the bank was bluffing and Mr. Grossman responded that:

[AS READ:

I wish I were bluffing. You need to

make -- he said, you need to make an offer.]

And that's -- after that is when I filed my motion to reopen the case and for sanctions.

Now, in their version of the events, Mr. Grossman tries to say that -- well, he doesn't come out and say it, but he makes it sound like I am the one who initiated the -- came to him with trying to say, oh, you refinance for the -- and we'll reaffirm the loan. He hints at that. He doesn't really say it. He tries to make the court believe that that was me approaching him.

Now, also in the affidavit of the bank president, Suellen Long, she says in the -- her statement that she was told to meet with her and discuss the loans. So she does admit that, well, somebody higher up to her was telling her to contact Ms. Kirkel and bring her in for a meeting about the condo loan. Again, a 524 violation. Also, Ms. -- as I pointed out earlier, she said that Ms. Kirkel gave her my information at that time, which I don't believe she'd ever heard of me before. She -- immediately after the meeting, she called one of my clients who then called her back with my information and then she called me.

Now, in the bank's statement, they say

that -- they said that I don't claim the bank was seeking a personal deficiency judgment of foreclosure. Well, I do. They have in the foreclosure one of their things they're demanding is a deficiency. They also claim that there's no damages. My client, as I pointed out to them during the discussions, while they were making their demands, upset my client quite a bit. She ended up putting the property up for sale because she was in a panic, having problems sleeping, didn't want to lose the property. It ended up having more value than any of us realized, and she does have a -- she has accepted an offer on it, so we are in the process of completing the sale of the property.

And also like to point out on day one of talking with them, they said they had case law, which I don't think they would be arguing if it was merely me approaching them. They would have had no need to do this, to mention that. So basically what they're doing is, you know, linking the two impermissibly and going way beyond what's allowed. And it seems like their statements are an attempt to kind of match some case law that they found that, you know, if we approach them, that it's okay to enter negotiations post-bankruptcy, but that was not the

case. And in terms of their filing the foreclosure that they're now trying to say the two were not linked, that it was just -- they were going to do that anyway. But they continued to accept payments, you know, from after the discharge was granted. In fact, they're still accepting payments. You know, they're getting a good interest rate. And if they were just going to foreclose, why would they not just foreclose? You know, why would they have contacted her except to make the links. And this kind of stuff is improper.

If you'll look at some of the other case law in the Seventh District, you have the United Airlines versus the International Machinists, where the machinists were calling in sick to try and force the company into speeding up negotiations. And the court ruled that, you know, yes, it's permissible for people to be calling in sick, but when they're doing it for an impermissible purpose, then that's not something they can do. And also in the United Airlines versus the United Pilots, the pilots begun refusing to pick up any overtime, were calling in sick and were doing things that they didn't have to do, but normally did. And the court ruled that, again, using something like that in an impermissible

way was not allowed. And it even -- the appellate court came down on the -- judge pretty hard and said that, you know, the company should have -- the union should have done something. If the union didn't do something, the company should have. And if the company didn't do something, it was incumbent on the court to do something to protect the public from this kind of -- that kind of behavior. And the case law is pretty clear. The stuff they tried to use, the Jamo case is only during -- during a bankruptcy. It doesn't apply post-bankruptcy, and the case law is clearly that after the bankruptcy, they don't have that -- really have that option again unless they want to reopen the bankruptcy case and then proceed under 524(c).

And so we're asking for Ms. Kirkel to be awarded legal fees, to be awarded something for her -- for their actions caused her to be panicky, to sell the property at the low point of the market, to -- I mean, her loss of sleep and her just, you know, entering into her, you know, agreements under duress which may not be in her best interests. It's hard to quantify such a thing because -- at this point, but it's definitely there.

Also, after she -- this started -- her

tenant in her commercial building thought, well, maybe the property is being foreclosed on, stopped making her payments. She had to go to court with him to get him paying again. He's still behind thinking he may be able to gain some advantage with this. And I think the bank's behavior -- it was pretty clear what they were doing. Their excuses, I don't think, are very believable. And I think their behavior was egregious. And I think in this case punitive damages should be awarded. I mean, the case law is not very clear in the Seventh Circuit, but there is some that says inappropriate behavior -- appropriate circumstances for egregious behavior that they would be awardable. We'd also -- the -- you know, we almost reached settlement on this, but the problem is they're still saying they want to foreclose on the property because their position is though they never linked the two. But Ms. Kirkel needs some protection if the sale doesn't occur as we hope it will or she's not able to get another buyer, then she still has their threats hanging over them, and that's why we're unable to reach settlement on this.

THE COURT: Thank you, Counsel.

MR. ROME: Thank you, Judge.

I'll just first address some of the

statements made by counsel. Early on he indicated that the condo payments were made during -- the condo payments made by his clients were made during the bankruptcy and post-petition -- or, I'm sorry, after the bankruptcy and after discharge. Even the documents he attached, they were made during the bankruptcy after she had filed the statement of intent to keep the property. So making payments is normal, and the bank should take those payments.

He mentioned the first meeting with the bank and his client. And he said that was during the bankruptcy. Well, she made a statement that said she wanted to keep this property. There was no lawyers present for Bridgeview. It was a banker who came in between the two clients, no lawyer present, and asked her what her intentions were after they filed. She filed the intention to keep both of those pieces of property. Again, nothing wrong with Bridgeview's conduct.

He later talked about that she's continuing to make payments. Judge, this loan matured in February of 2011. Everything is due. So to say that she's current is just either incorrect or a fabrication. The whole loan became due in February of 2011. And we have a discharged debtor

against this property. I don't really know what else the bank can do. He talked about the March 27th. First off, there was no date in the affidavit. There is a lot of things that counsel is testifying to right now. A lot of things that he's bringing up that aren't in his affidavit. They're not sworn before this court. I think it's inappropriate for this hearing. Your Honor made it very clear that any evidence should be in front of the court prior to today's hearing. And now counsel is going and telling a story that he has that's not even in his own affidavit. But he brings up a date which was nowhere to be found that there was a second meeting between the bank on March 27th, after the discharge. Well, if that's the case, on one hand, his client is saying that she absolutely wants to renegotiate a discharged debt on a commercial loan. And she wants to talk freely about that. But, she doesn't want to talk anything about the HELOC. It's diametrically opposing one another, Judge, if she's coming into the bank and talking about something that she thinks is inappropriate. Plus, the affidavit that's before Your Honor states that the bank did not talk to her at all about any of the negotiations. They wanted -- they found out she was represented by counsel and

that's when he may have a different story about actually how it occurred. But they reached out to counsel to continue on these negotiations.

Counsel hasn't really brought up any case law that talks about a bank being sanctioned for negotiating with another attorney. And that's all that he's talking about. He's talking about negotiations between himself and the bank after a discharge. I haven't seen any cases like that. He hasn't brought any up.

Just to address other things he's talking about here. The deficiency judgment, I have a copy of the foreclosure complaint, Your Honor, if you'd like to see it. They're not seeking a deficiency judgment. I'm sure Your Honor had a chance to review --

THE COURT: I've seen the complaint.

MR. ROME: Okay. So I don't -- again, there's just things coming out that really don't make any sense, at least from my perspective.

Punitive damages, we've provided the case law on that. There are no punitive damages, so -- panicky? I've never -- they have to have actual damages. Panicky, loss of sleep, and forcing her to sell her property for a profit. The bank has

every right to move to foreclose on a piece of property they have. A loan's matured. They have no borrower, and they have an in rem -- they have an in rem lien against that property.

So after I addressed what he said, we have really eight points that we'd like to make: First, Bridgeview's foreclosure complaint did not violate the discharge order at all. Second, Bridgeview's negotiations with debtor's counsel, so his predecessor, during the bankruptcy did not violate the automatic stay. Third, Bridgeview's negotiations with counsel, counsel standing to my left, after the discharge did not violate the discharge order. Four, which I've addressed a little bit earlier, accepting payments from the debtor for the residential loan after debtor filed a statement of intent to keep the property did not violate the automatic stay. Fifth, Bridgeview's in-house counsel, Kevin Ameriks, did nothing to subject himself to liability. If anything, he may have a counterclaim against Ms. Kirkel. All he did was inherit a file, see that there was no borrower, and he filed a foreclosure. He didn't reach out to her. He didn't reach out to anybody else. And there's nothing in the record that shows anything different.

Six, Bridgeview's former in-house counsel Josh Grossman was permitted to respond to counsel's direct negotiations regardless of who negotiated first and, therefore, did not violate the discharge order. Seven, according to Judge Baer's opinion issued eight days ago, in In re Richard Klarchek, this debtor lacked standing to bring a cause of action for violation of the automatic stay because such a claim can only be made on behalf of the Chapter 7 Trustee. That's a claim of the estate. And eighth, the debtor hasn't sustained any damages.

So I'd like to go through them all, Your Honor, but I know Your Honor might be short on time. But if you would let me, I'd like to go through all each eight of those.

THE COURT: Let me cut part of this short.

MR. ROME: Okay.

THE COURT: And that is with respect to predischarged actions and whether or not those may or may not have been violations of the automatic stay, that shouldn't sail. That's not something that's properly before this court, and I'm not considering that in any calculation of damages. The -- I'm familiar with Klarchek. I'm actually the

judge assigned to the Klarchek matter. Judge Baer was helping me out. I'm well aware of the standing issue. But putting aside the standing issue, the automatic stay is not at issue here. The question here is whether there's been a violation of the discharge injunction. And so any discussion with respect to 362 and actions that took place prior to the discharge insofar as they relate to 362 is simply a waste of time at this point.

Now, actions prior to the discharge are relevant to the extent that they show a course of conduct that may or may not have been continued afterwards, either to the benefit or to the detriment of the respondent here. So I'm happy to hear about those actions in that context, but I don't need to spend any time on 362.

MR. ROME: Okay. I will skip over those parts then.

All right. For the first, Judge, we'll focus on Bridgeview's foreclosure complaint and whether or not it violated the discharge order, which clearly we think it doesn't.

A discharge order merely bars acts to collecting mortgage debt as personal liability of the debtor. It does not prevent a creditor from

enforcing its mortgage lien against the mortgaged property. Section 524(a), which I know Your Honor is well aware of, provides the discharge order operates as an injunction against their commencement or continuation of an action to collect, recover, or offset any debt as a personal liability of the debtor. Section 524 does not provide that prepetition liens are avoidable, nor does it bar a creditor from pursuing in rem recovery against the property of the debtor.

I'm assuming Your Honor would like me to move forward, because I think we all know that we could foreclose on this property. Also, we pointed out in the Redmond case, Your Honor, which is a 2010 Seventh Circuit case, the Seventh Circuit stated, and I quote "never" -- well, it says the result "according to the Seventh Circuit, a discharge order can never affect a bank's right to foreclose on its mortgage lien." BBG, contrary to what counsel said, is not seeking personal judgment against Kirkel, nor is BBG taking -- Bridgeview -- I say BBG, Your Honor, just clarification of the record, taking any other action to recover amounts due under the commercial loan as a personal liability of Kirkel. Instead, Bridgeview is merely seeking an in rem recovery

against its commercial property. As such, Kirkel has failed to provide any evidence, let alone clear and convincing evidence, that Bridgeview's proposed constitutes a violation of discharge order. Additionally, contrary to Kirkel's motion, there's no evidence that Bridgeview's filing of the foreclosure is vindictive or lacks an economic purpose.

Kirkel insinuates in her motion that the value of the commercial property is so depressed that Bridgeview has no realistic hope of recovering money from a judicial sale, thus the foreclosure is vindictive. Yet, Kirkel fails to supply the court with any evidence to support her view of the commercial value of the property. In contrast, Kirkel's counsel indicated both first to me and now in front of Your Honor that she actually signed the contract to sell the commercial property for a price sufficient to pay off all liens against the property, including Bridgeview's mortgage. Thus, the commercial property is clearly far more valuable than Kirkel would like the court to believe, and therefore there is a direct economic purpose for Bridgeview to pursue a foreclosure action.

Under these circumstances, Kirkel cannot maintain that Bridgeview filing the

foreclosure was merely vindictive and to force her to pay off her residential loan. There's clearly another reason why, and it's an economic reason.

Skip this part, Your Honor.

What we had down as third, but, Your Honor, Bridgeview's post-discharge communications with Kirkel did not violate the discharge order. At the time of Kirkel's discharge, as counsel indicated, Bridgeview held two outstanding loans in its books. One was secured by the property owned by Kirkel, the commercial property, and one was the residential. Though both loans are in default, contrary to what counsel has indicated, that loan matured on February of 2011, it's attached to the complaint, attached to the foreclosure complaint -- strike that. It could be 2012. That loan has matured in its default.

Kirkel, as counsel indicated, continued to make payments, but those payments stopped in October. So even though she was making what she believed were payments on a loan that's already matured, those have even ceased.

Kirkel continued to express intent or interest through her counsel in entering into a new post-discharge arrangement that would permit her to at least retain the commercial property. So we have

two debts that have been discharged, and she's at least showing interest in keeping the commercial property post discharge.

Under these circumstances, the discharge order did not bar Bridgeview from responding to Kirkel's inquiries by discussing various possibilities and arrangements that would permit Kirkel to retain the commercial property, especially when all the discussions were initiated by Kirkel's counsel. And that's what the record indicates. The following is a direct quote from the In re Henry case, Judge, that we cited on page ten of our brief. And it says:

[AS READ:

If a debtor is represented by counsel, any creditor may communicate with counsel from the debtor without violating the automatic stay or the discharge order. Counsel has no need to be shielded from a client's creditors. It is part of the job of counsel for debtor to deal with the client's creditors.]

So what counsel is indicating is that he should be protected and any communication through him is a violation of a discharge order. Here, none of Bridgeview's post-discharge communications with

Kirkel or her attorney violated the discharge order. By all accounts, all of Bridgeview's post-discharge communications regarding this matter were made to Kirkel's attorney, not to Kirkel. And Bridgeview only responded to Kirkel's request for an arrangement that would permit her to retain the commercial property.

Initially, the post -- the parties' post-discharge negotiations focused on an offer of certain of Kirkel's friends to purchase one or more of Bridgeview's REO properties in exchange for an agreement that Bridgeview would enter into a new loan with Kirkel.

And this reaffirmation keeps getting bounced -- it wouldn't be a reaffirmation. It would be a new loan because that has already been discharged.

Later when it became apparent that Kirkel's friends would not be purchasing the REO properties from Bridgeview, it was Kirkel's counsel that first suggested that Kirkel might make voluntary payments with respect to the residential loan as part of a new loan agreement with Bridgeview. That's what the affidavit says; it's not contradicted. However, no agreement was ever reached between Bridgeview and

Kirkel. There are many possible legitimate forums that a post-discharge arrangement between Kirkel and Bridgeview might have taken place, such as voluntary payments on a new loan, permitting Kirkel to retain the commercial property. Kirkel speculates that Bridgeview wanted the parties' negotiations to result in an agreement that violated the discharge order, but Kirkel could not provide any evidence to support her speculation. Even Kirkel admits that no agreement was ever reached between her and Bridgeview. And she does not claim that she actually made involuntary payments on a discharged debt. Again, Kirkel has failed to cite a single case where a creditor was sanctioned for violating a discharge order based on nothing more than mere negotiations with debtor's lawyer.

Fourth, Your Honor, this is pre -- Kirkel's request for entering an order holding Kevin Ameriks personally in contempt is baseless. Ameriks was not involved in any negotiations with Kirkel or her attorneys either during or after the bankruptcy. The only thing that Mr. Ameriks did was file a foreclosure action, which was nothing more than a legitimate attempt by Bridgeview to recover the in rem judgment against the commercial property.

Counsel himself stated in his argument that he thought that the matter had just gone way. But now when a new attorney picks up the file and does what he should do, somehow he -- should he -- a lawsuit should be filed against him and a motion for sanctions? It just isn't proper. The foreclosure action does not involve any attempt to recover against Kirkel personally. As such, there is no evidence that would remotely provide a basis for holding Kevin Ameriks personally in contempt for violating the automatic stay or the discharge order.

Kirkel's request for an entry of an order holding Joshua Grossman personally in contempt is also misguided. Although Grossman was involved in the negotiation with Kirkel's attorneys, he never did anything to violate the automatic stay or coerce Kirkel to pay a discharged debt. There's not one shred of evidence or testimony that Josh Grossman even spoke to Ms. Kirkel even once. All communications were through his counsel. All of Grossman's communications, again, were with Kirkel's counsel. Most of Grossman's communications involved responding to inquiries from Kirkel's counsel and none of Grossman's communications involved an improper attempt to collect a discharged debt from

Ms. Kirkel. If there were negotiations going back and forth, those were simply negotiations between attorneys. As such, there is no evidence that would remotely provide basis for holding Grossman personally in contempt for violating the automatic stay or the discharge order.

Lastly, Judge, the debtor has not sustained any damages. In a civil contempt proceeding, which I know Your Honor is well aware with for violation of discharge order or the automatic stay, sanctions may only be imposed for two purposes; namely, to coerce the defendant into compliance; or two, to compensate the debtor for losses sustained by the disobedience. With regard to the violation of the discharge order, a debtor may generally recover for post-discharge payments, which she's made none, and reasonable attorney fees directly related to the litigation at issue. The debtor may not recover punitive damages in a civil contempt proceeding and that's the Cox case, Your Honor, which is the Seventh Circuit, 2001.

In this case, Kirkel cannot possibly establish that she suffered any losses relating to any of the alleged misdeeds of Bridgeview or its employees. Kirkel does not allege that she made any

involuntary post-discharge payments with regard to the residential loan, nor does she claim that any of her attorney negotiations with Bridgeview ever resulted in a final agreement of any kind. In the past, Kirkel's claimed that she feels compelled to sell her commercial property rather than deal with Bridgeview. Yet, even if this were true, Kirkel does not claim that she is suffering a loss from the sale of the commercial property, nor does she assert that she's selling the commercial property for less than fair market value. Moreover, according to her attorney, again, Kirkel secured a sale of the commercial property that will permit her to pay off all the liens on the property for an undisclosed amount of money.

Under the circumstances, it appears that Ms. Kirkel's likely profiting from the sale of the commercial property but refuses to disclose the sales price because it's either in line with or exceeds the fair market value. Thus, Kirkel has failed to establish that she suffered any losses due to any actions taken by Bridgeview or its employees, and she is prohibited from recovering punitive damages in a civil contempt proceeding. Kirkel may have incurred some attorney fees in connection with

this matter, but none of those fees can fairly be characterized as reasonable in light of Kirkel's failure to establish any damages, not to mention her failure to establish a single violation of the automatic stay, which Your Honor has already indicated, for the discharge order.

Thank you, Judge.

THE COURT: Counsel, you get the last word.

MR. CLOUTIER: Okay. When we first came, I did mention the 362 violations, and my understanding was that you would take that with the rest of the evidence and so forth.

THE COURT: Again, Counsel, to make my comments clear. To the extent that it evidences a course of conduct that continued after the discharge injunction was in place, then the pre-petition -- or pre-discharge injunctions are relevant. But I'm not -- I'm not considering an award of damages under Section 362. The time for seeking that was prior to the discharge being entered. The court has continued jurisdiction to enter 362 damages after the discharge, but only if the action is brought before the discharge itself is entered.

MR. CLOUTIER: Okay. All right.

He mentioned the first meeting being banker initiated. It's still a violation. I mean, they can't take any action to collect. But I guess that was -- that would be a 362 also. But -- and he tries to say that my affidavit didn't name the exact date of the meeting. But their affidavit does. It says specifically on March 27th they say the meeting took place. My client's affidavit talks about how the meeting was initiated, that she was told to come in to discuss the condo loan. So the date's there. And she was not represented by counsel at that meeting. So Ms. Kirkel's affidavit clearly talks about what happened at the meeting, that she was told she was going to have to pay something on the condo loan. They said they wanted $50,000 or they would start the foreclosure.

The -- he repeatedly said that they're not asking for any personal judgment in the foreclosure action. But, I mean, it's clearly in here. In their prayer for relief, item C, they're requesting a personal judgment for deficiency to the extent applicable. So it's clearly in here, in their demand for -- in their prayer for relief.

And in terms of actual damages, she has had actual damages. She had the attorney's fees

she's had to pay. She's had problems with her tenant who is worried that he was going to lose his -- not be able to operate his business there because they were going to start foreclosure. So he began making his payments, his rent payments sporadically and she's had to take him to court.

And, again, they keep trying to stress that I initiated the actions and the conversations; that was not true. I mean, it clearly looks like the bank could not reach the attorney to get negotiations going to try to collect on that -- the condo loan so they had the bankers bring her in, threaten her, and then told her to have the -- when they couldn't get anywhere with her, they told her to get an attorney and have him contact their attorney.

He talks about Mr. Ameriks, another attorney for the bank, not being responsible, that he just picked up the file. Well, he was -- Mr. Ameriks was involved in the bankruptcy. It seems like he was aware of what was going on. The -- he either knew or should have known about the threats as -- and, also, in the foreclosure, like I pointed out, he did ask for a personal deficiency judgment.

THE COURT: Counsel, let me -- point to me where it says that.

MR. ROME: I can show you, Judge, right here where it says --

THE COURT: Just tell me the paragraph number. Because I'm looking at --

MR. ROME: Mine is paragraph M, Judge, on page three. It says "no defendant remains liable for any deficiency."

THE COURT: I see that, but I want to know where counsel is saying there's something --

MR. CLOUTIER: In the prayer for relief.

THE COURT: Where in the prayer for relief?

MR. ROME: Section C, Your Honor, he's referring to.

THE COURT: To the extent applicable.

MR. ROME: Exactly.

THE COURT: All right. Go ahead.

MR. CLOUTIER: Now, they also point out -- they're also trying to make it out like they have no choice but to foreclose. But if that was true, why would they even be discussing doing a new loan and on more favorable terms? So obviously they had the ability to do some kind of refinance with Ms. Kirkel.

Now, they bring out the Henry case, which says communications is okay. And that may be true, but they went more beyond communication. They were putting threats in there, do this or we're going to do this. And the case law clearly says that they can't do that. For some -- in In re Butler, the 2011 case, it says that for something to be voluntary, it must be free from creditor influence or -- and that voluntariness [sic] is destroyed if the pressure is brought to bear by the creditor. And that's clearly what is happening here was, you know, we're going to take your commercial building if you don't pay the discharged debt.

I think, you know, if you look at the e-mails it's pretty clear. You know, they initiated this and they were -- they made an effort to try to collect a discharged debt in violation of 524. And they also said no post-discharge payments on the condo. I believe there were a couple that were taken afterwards. After the discharge was received, they continued to take payments and she even had to close her account to stop that. And they also point out that she's making a profit on the building. Well, she's owned the building since 1994. So, I mean, she should make a profit if she sells the building. It's

a -- you know, she's had a long-term ownership of the building and I don't think that's unreasonable to expect.

And he also says that I failed to point out any case law of where without damages, there were -- it's not a violation. Well, I mean the McClure case in Texas, I believe in 2010, where Sears had hired a company to try and collect a discharged debt without telling them it had been discharged. All that happened in that case was that the collection agency made phone calls and were immediately told that the -- they filed bankruptcy and the response of the collector was just to say damn, and hang up. And the court sanctioned Sears quite heavily, I think in the area of 300,000 and until they put in -- they lowered it later when Sears put in procedures to stop that. I guess it was a repeated abuse of using that kind of tactics.

So I think what we have here is pretty clear. They wanted to try and collect on that discharged loan. They took action. They had the bankers call her in to make threats to her and to get discussions going on her paying something for it. I think everything is pretty clear, clearly shows that.

THE COURT: Okay. All right. So what

I'd like to do is this, which is I'd like to get just a short recess so I can get my notes and my thoughts together. I pretty much had that before I came in, but based on the comments of counsel, I need to adjust a bit of that to make sure I'm clearly understanding the issues. And so it is currently 2:33. I'm going to take a recess until 2:45. We'll reconvene at that point.

MR. ROME: Thank you, Judge.

(Brief recess.)

THE COURT: Okay. Let's have counsel at the lectern, please. We're back here on the Kirkel matter.

All right. So I've taken the time to take a look at the issues here. And there are a few points I'll raise just in the way of clarification. And that is, first of all, I just want to put to rest something that I think was misstated. Counsel attempted to use -- from Bridgeview, attempted to use sort of a general application of law with respect to civil contempt to find that in the context of a discharge injunction violation, the punitive damages are inapplicable. The Seventh Circuit has actually directly held that punitive damages in a discharge injunction violation are applicable and that's the

Randolph versus IMBS case, a 2004 Seventh Circuit case.

Now, having said that, I take a look at this case a bit in reverse of what I would normally do, which is what I would normally do is I would get the facts at bar, I would ask myself, do I see a violation. I would work through the technical aspects of that violation, and I would come to the conclusion whether or not a violation exists. And then if one exists, take a look at damages. But let's, for the purposes of this case, do the opposite. Let's start with the damages and work our way backwards. And that is because the court is having a hard time finding damages here. The damages that have been alleged by the debtor almost exclusively arise out of acts that could have taken place without a violation of the discharge injunction, and that is the foreclosure on this loan. Virtually all of the damages alleged have to do with the distress of the debtor, the potential financial impact of going through a sale in lieu of the foreclosure and items such as that.

The court perceives those as being damages that would be incurred if a simple foreclosure action was brought and no negotiations

had taken place with respect to the discharged personal liability of this debtor.

Now, having said that, what that says to me is did the foreclosure action in and of itself give rise to damages? No. The foreclosure action in and of itself was not a violation of the discharge injunction. The bank is within its rights to bring a foreclosure action. However -- there's always that however, it seems. However, I have a problem with the complaint that was filed in this case. All right? The complaint that was filed in this case appears to me to be artfully crafted so that it reserved the right to seek personal damages but put in a savings clause such that if they were caught, if Bridgeview Bank was caught seeking personal damages against -- personal liability against this debtor, they get to claim that they weren't really doing that. There's no legitimate reason to put the request in the complaint the way it was put if this bank was not hoping for the possibility of a judgment of personal liability against this debtor. There is absolutely no reason to put it in the way it was put in. It was put in there twice. It was put in in the recitation of where it says that no defendant remains liable on this personally absent a ruling of a court

of competent jurisdiction. There's your savings clause in the opposite direction, which is, oh, by the way, court, you might be the court of competent jurisdiction that can make that determination.

Counsel, I'm not accepting argument on this. And in the prayer for relief. And in the prayer for relief, again, it says, I'm seeking personal judgment except to the extent that that is inappropriate. Again, that -- it could just be poor drafting. I'll give you that. Complaints get reused over and over again. Yet that poor drafting happened to happen in a case where there is a discharge injunction.

And so I do find that the -- that aspect of the foreclosure action is inappropriate and is in violation of the discharge injunction. But that violation is de minimis at best. I cannot see evidence that gives rise to the fact that the negotiations in any way exacerbated that particular issue, that the negotiations centered around the complaint seeking personal judgment. I don't see that that in and of itself really independently stood for anything other than the fact that this bank did something that it shouldn't have done. The negotiations around the debt, let's be clear on this,

counsel have talked back and forth about what the case law is regarding the negotiations on the debt. And there is, in fact, case law that talks about how parties can negotiate prior to the entry of a discharge regarding the trade-off between debt that is dischargeable and a debt that isn't, and the reaffirmation of certain debt. And there are some clear case law that says that that type of negotiation is not a violation of the automatic stay. Clearly, that sort of negotiation took place here prior to the entry of the discharge. The continuation of such negotiations after the entry of the discharge in the context of an otherwise righteous or further action is not, in my mind, a violation of the discharge injunction.

There is, in fact, a clear case on this issue and it had to do with this pure discharge issue, and that is -- excuse me a moment. The Heirholzer case out of the Northern District of Ohio. That's 170 B.R. 938, and it had to do with a post-discharge foreclosure action, and whether the negotiations with respect to that foreclosure action constituted adequate consideration for a debtor with a discharged debt to consider reaffirming, or reinstating or doing something with respect to that

debt in exchange for the lender forbearing from foreclosing on this debt. And the court in that case found that it was, in fact, adequate consideration under the negotiations.

It brings us back to a very salient point in bankruptcy, and that is this: Nothing requires a creditor to extend new debt to a debtor who has filed for bankruptcy. In this instance, the past course of conduct on this loan is not in any way, shape or form controlling on the parties' future actions. The fact that the loan -- the note was coming due on a yearly basis and was, in fact, customarily renewed doesn't obligate this lender to continue to renew the note. As a matter of fact, structuring a loan with a mortgage that goes out 20 years but with notes coming due every year is a tried and true cautionary tactic by lenders to make certain that there is, in fact, an obligation that comes due and can be collected under certain circumstances.

So it's not unfamiliar and it's not impermissible. The note had come due. The right to foreclose appears to have existed. The fact that this lender was unwilling to extend the note, except in the context of a -- not a reaff -- we keep using the term reaffirmation, but some sort of agreement to

repay discharged debt is not to this court a per se violation of the discharge injunction because as in the Heirholzer case, this lender's forbearance from foreclosing is in fact a valid consideration to be traded against such negotiations.

Now, again, I find that this lender could have and did in fact foreclose upon this action, found the foreclosure as deficient though because of the -- because of the particular clause in the complaint. I find no actual damages in this matter other than counsel's fees with respect to the matter, but I also find that counsel's fees, with respect to this matter, are too much with respect to the issue in question. And, that is, it's clear that a fair amount of time was spent pursuing causes of action that are not viable and that counsel admits that he's not a bankruptcy lawyer. And I understand that, but that the -- under the circumstances, the issues could have been drilled down upon much more quickly and much more efficiently.

So what I'm willing to do in this matter is award $4,000 in attorney's fees. Nothing more. No other actual damages and no punitive damages in this instance. I find that the public finding on the record that Bridgeview had violated

the discharge injunction is sanction enough. I find that the other alleged actual damages are damages that are not a cognizable injury from this particular violation of the discharge injunction.

So that is the court's ruling with respect to the matter before it today. Do either of the parties have any question on the court's ruling?

MR. ROME: No, Your Honor. Just for clarification, is now the bankruptcy has been opened, are we closing it so that we don't have any issues with the state court matter?

THE COURT: I will close it upon verification that the damages have been paid. If -- once the damages have been paid, what I would ask happen is the party who wish -- obviously wants this closed, which is Bridgeview Bank, deliver a notice that says they paid the damages in question. All right? And thereby are requesting that the court close the case.

MR. ROME: In a motion, Your Honor, or just an order dropped off?

THE COURT: I think you can just drop off the order, but you have to have a verification that you have, in fact, paid -- satisfied the judgment in this matter. I will enter judgment today

on this with respect to this amount, and I think there's actually a provision in the bankruptcy rules regarding satisfaction of judgments and how to do that. So just take a look at that.

MR. ROME: Thank you, Judge.

MR. CLOUTIER: Thank you, Your Honor.

THE COURT: Any other questions?

(No response.)

MR. ROME: Thank you, Judge.

THE COURT: All right. Thank you.

(Which were all the proceedings had in the above-entitled cause, February 6, 2013, 1:30 p.m.)

I, NICOLE ABBATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT OF PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE.